

## The Central Law Journal.

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## CURRENT TOPICS.

IN *Bennet v. Bennet*, recently decided in the English High Court of Justice, it was held that an intention that a gift to a child is an advancement, will not be presumed in the case of a widowed mother under circumstances in which such an intention would be presumed in the case of a father. JESSEL, M. R., said: "The doctrine of equity is that where one person stands in such a relation to another, that there is an obligation on him to make a provision for the latter, and we find a purchase or investment in the name of the latter, or in the joint names of both, of an amount which would constitute a provision, there arises the presumption of an intention to discharge such obligation, and, therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift. The presumption of a gift arises from the moral obligation to give. That reconciles all the cases except one, because it is well established that, as regards a child, a person not the father may put himself *in loco parentis*, and so incur the obligation to make provision for the child. What, then, is meant by a person *in loco parentis*? It means a person taking upon himself the duty of a father to provide for the child; so that the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else. In the case of a father, the obligation arises from the mere fact of his being the father; no other evidence is necessary; it is part of his duty. But in the case of a person *in loco parentis*, you must prove that he undertook the obligation. Now, in our law there is no legal moral obligation—that is, no such obligation as a court of equity recognizes—on a mother to provide for a child. From *Holt v. Frederick*, 2 P. Wms. 357, downwards, it has been held that no such obligation exists; and, therefore, an advancement to a child by a mother is not in itself sufficient to raise the presumption in law that it is a gift. In *Sayre v. Hughes*, however,

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Vice-Chancellor Stuart decided to the contrary, although previously in *re De Visme*, 12 W. R. 140, 2 De G. J. & S. 17, the Court of Appeal had assumed the law to be as I have stated it."

Stock Gambling has received another blow in the recent decision of the Supreme Court of Pennsylvania, in *Fareira v. Gabell*, 20 Alb. L. J. 48, to the effect that notes given by a purchaser to a stock broker to cover losses incurred by the broker in stock gambling, on the principal's account, are void. The action was one of assumpsit on five promissory notes, drawn by the defendant to the order of the plaintiff. The plaintiff having offered in evidence the notes, the defendant set up that, being desirous of operating in stocks, he employed the plaintiff, a broker, for that purpose. The contracts made through the agency of the plaintiff were simply contracts of wager. These transactions continued about two years. In July, 1875, he gave the plaintiff three of the notes in suit, amounting to \$7,000, as "margins on stock contracts," and two months later gave the other two notes for \$5,000 for indebtedness then appearing due. The evidence for the plaintiff in rebuttal was that in a settlement of accounts in November, 1875, there appeared a balance due the plaintiff from the defendant of \$14,794.67, which the defendant had admitted to be correct; that the defendant not having fulfilled his contract, the plaintiff had advanced the money necessary to cover the defendant's losses, with his assent, and also that, in some cases, the stock was actually delivered to the purchasers and sometimes it was not. The trial judge, in his charge to the jury, stated the principles governing the case as follows:

"Was this a gambling or wagering operation which the law does not sanction, and will not carry into effect? Now, a wager may be defined as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss.

"This may be illustrated by an example: A and B agree, in consideration of a premium paid by B, that if a certain ship is lost at sea, A shall pay B the value of the ship. If B has no interest in the ship, it is a wagering contract, but if B has an interest, and will be loser if the ship is wrecked, it is a contract of indemnity and not a wager. So, if two men agree that if coffee rises in price, one of them shall pay a sum of money to the other, it is a wager, if they have no other interest in the coffee than that growing out of the contingency about which they stipulate. But it does not follow that every contract which produces such a result

is a wager; the question is one of intention, as deduced from facts and circumstances.

"Let us suppose that A agrees with B to buy a thousand bushels of wheat, at \$2 per bushel, to be delivered and paid for at the end of thirty days. If wheat raises in value, A will be a gainer, and if it goes lower he will lose, but inasmuch as the apparent object of the contract is an actual purchase of the wheat, it is not a gaming contract. Nor could such a contract be justly regarded as a wager, although when the time for the delivery of the wheat arrived, it was agreed that B should, instead of forwarding the wheat to A, pay him the damages to which he would be legally entitled for a refusal to deliver; that is to say, the difference between the stipulated price and the actual value of the wheat at the time fixed for the fulfillment of the contract. Such a settlement of the difference would not, if there was nothing more, be a sufficient ground for inferring that the contract was a gambling contract, or contrary to law. But the case would be materially different if the evidence, taken as a whole, showed that A and B did not really intend to buy and sell; that there was no intention on the one hand to deliver, or on the other hand to receive, the wheat, and that their real purpose was to make a wager in the form of a contract of sale. Hence, if A and B were to deal with each other in the way supposed, during a series of months or years, and it appeared in evidence that B did not, in any single instance, forward the wheat, or have it in readiness for delivery, and that when the time arrived for the fulfillment of these successive contracts, they were always settled by the payment of a sum of money answering to the rise and fall in price, the question would then be one of fact for the jury, whether the parties really intended to buy and sell, or to make a wager on the price of grain."

The jury returned a verdict for the defendant, which was affirmed on appeal, the Supreme Court filing no opinion except to concur in the full and accurate charge of the court below, and to refer to *Brua's Appeal*, 5 P. F. Smith, 274, and *Smith v. Bouvier*, 20 Id. 325. But in neither of these cases was the distinction adverted to between an action between principals brought to recover the differences in a wagering contract relative to the price of stocks, and an action by a broker, or other agent in the transaction, for the recovery of money loaned to pay those differences.

#### SUGGESTIONS UPON CODE PROCEDURE AND CODE REVISION.

##### III—CODE REVISION IN GENERAL.

It is impossible to conceive a more difficult and delicate task than the one which is imposed upon a revision commission, where their duties require a revision of one of our modern codes of procedure. It is unquestionably true that there are more lights to guide the mere reviser than were afforded the original codifiers. And yet, in many respects, more difficulties beset the reviser than the codifier. There, an entirely new path had to be trod, or, at all

events, entirely new models must be adopted, or followed to a greater or less extent. And the plan usually was, after the adoption of the pioneer code, to follow models, and in most instances most severely. The history of codification would perhaps reveal the fact that, in most of the instances in which the later codes differ from the models from which they are copied, the difference has been caused by legislative revision, introduced after the code commissioners have finished their work. But to the revision commissioners is committed a different work. After a quarter of a century in the administration of code procedure by the courts, there develop crudities in the structure of the different provisions, and in their application to their subject-matter. Crudities in language, resulting most frequently from legislative attempts to improve upon former codes, in many cases changes making confusion rather than improvement. Again, the greatest imaginable confusion prevails in code reports. Indeed, in many of the States in which the reports of the court of last resort took very high rank among the State reports, they have lost their prestige, and fallen far below their former reputation, since the adoption of a code; until in the States where the common law forms still prevail, the reports in the code States are more or less out of repute, though, as we submit, unjustly so, as this contempt for code reports, upon general questions of law, is part of the popular prejudice discussed in a former paper. There is no reason why good lawyers may not decide general questions of law as well under a code system as the common law system.

But the confusion to which we refer, and which thus affects the reputation of code reports, is altogether upon questions of pleading and practice. With the experience up to the present time, with the aids that are now found to guide the profession and the courts, it is difficult to appreciate the difficulty which surrounded the courts in the earlier history of this procedure. The early specimens of pleading and the forms of procedure were crude and unshapely, having been framed without any adequate precedents. And both judges and lawyers were incased, so to speak, in the environments of the formula of the old technical learning, and hence the early practice reports show a constant struggle between an effort to carry out the spirit of reform inaugurated by

the code, and the application of the purely technical rule of the old system utterly out of harmony with the new system. The one principle or the other prevailing, as the court happened to belong to the old foggy or the progressive class respectively.

If we add to this the consideration that the adoption of the new system made an excuse for the litigious, and even for those not so, to litigate upon points of practice to the courts of last resort; thereby largely increasing the business of these courts without any increased facilities; that the courts were all overcrowded, and it is not wonderful that these early practice reports are not more uniform. These early rulings have very largely been reviewed by the courts themselves, and every year the overruling of inconsiderate rulings, and the revising and qualifying of imperfect, incoherent and inconsistent ones, not properly sustained by principle or legal analogy, have been in progress.

While these processes are producing greater uniformity, and a very beneficial result in perfecting a system, they render the work of the reviser doubly laborious. For the first work of the reviser is to ascertain what construction has been put upon each provision of the code by the court of last resort. Without this knowledge he labors in the dark to a great extent. But while this work is herculean, it may and must be accomplished by the reviser before he can proceed with his work. The methods by which this work is performed depend much upon the facilities furnished by annotated codes, digests, indexes and the like, which are accessible in the State wherein the revision is to take place.

The meaning of each provision of the code of procedure being ascertained in the particular code to be revised, only one consideration should actuate the reviser, viz.: the remedying of that which is defective. But in carrying out this consideration, these inquiries must arise at every step. Will revisory legislation render the practice under the particular provision more simple and easy and less expensive? Will a change lessen litigation? Have the rulings under the provision left its construction so uncertain as to need reform? Or is the provision itself so obscure, and is there such a want of uniformity in the rulings as to render the same still uncertain or obscure?

Or is the provision too narrow, and have the rulings been so narrow and illiberal as to pervert the beneficial purpose of the provision and call for amendment? Is the provision redundant or unnecessary? Does it fail to accomplish the purpose for which it was designed? Is it necessary to have additional provisions, one or more, in order to give proper scope and effect to the one or ones under consideration? In short, taking into account in the exercise of a wise discretion, the convenience or inconvenience, the good or evil to be accomplished, is it clear that good and not evil will result, should the provision be revised or amended? If any of these questions can be answered in the affirmative, then a case is made out for the action of the revisers.

But if some one of these particular inquiries as well as the last general one, cannot be answered affirmatively; if the good and evil, the convenience and the inconvenience are evenly balanced; if although a provision was originally obscure, it has been made plain by construction; if it was originally narrow, but has had a liberal construction, whereby the purposes of it have been met; if the provision was originally too broad, yet if by construction it has been properly restricted, it should be left untouched: in other words, whatever the original provision was, it is to be considered with its construction, and when thus considered, if it answers the appropriate purpose, it should remain untouched.

With this generalization as to the rule which should govern in exercising or withholding the revisionary discretion, we propose to devote the remainder of this paper to the enumeration of a few representative classes of cases which may be regarded as an illustration of the rules thus generally laid down. A. I.

(To be continued.)

#### MALICIOUS PROSECUTION — WHEN PROSECUTION AT AN END.

POTTER v. CASTERLINE.

*Supreme Court of New Jersey, February Term, 1879.*

1. MALICIOUS PROSECUTION — PLAINTIFF MUST SHOW PROSECUTION AT AN END AND WANT OF PROBABLE CAUSE.—In an action for malicious prosecution, the plaintiff must show that the prosecution or proceeding of which he complains is legally at an end, and that it was instituted maliciously and without proba-

ble cause. The legal termination of the prosecution is sufficiently shown by the refusal of the grand jury to find a bill, without a formal order of discharge by the court. A rejection of the complaint by the grand jury is *prima facie* evidence of want of probable cause.

2. THERE IS NO ERROR IN REFUSING to non-suit, if, from the facts proved, the jury might infer that the defendant had no actual belief or suspicion of the plaintiff's guilt.

3. A DEFENDANT IN SUCH AN ACTION can not excuse himself by showing that he acted under the advice of an unprofessional person.

In error to the Middlesex Circuit.

B. A. Vail, for the plaintiff in error; Garret Berry, for the defendant in error.

WOODHULL, J., delivered the opinion of the court:

Casterline, the plaintiff below, brought his action on the case in the Middlesex Circuit Court, against Potter, the defendant below, complaining that he had falsely and maliciously, and without any reasonable or probable cause, procured him to be arrested for the crime of larceny.

The declaration sets out the issuing of a warrant by a justice of the peace, on the application of the defendant; the arrest and imprisonment of the plaintiff by virtue of it, until he had entered into recognizance for his appearance at the next Court of Oyer and Terminer, etc.; his appearance at the time and place specified in his recognizance; and that "thereupon the said defendant not having any ground or evidence to support the false and malicious charge, etc., the grand jury of the said county returned not a true bill of indictment against the said plaintiff, and the said plaintiff being innocent of the said supposed offense was then and there duly discharged out of the said custody, and fully acquitted and discharged of the said supposed offense;" that the defendant had not further prosecuted his complaint, and that the prosecution was wholly ended and determined.

The defendant having pleaded the general issue, the plaintiff, in support of his allegations as to the termination of the proceedings against him, proved that the papers relating to them, the affidavit, the warrant for arrest, the search warrant, and recognizance were duly forwarded by the justice to the prosecutor of the pleas of the county, and were by him presented to the grand jury, who ignored the complaint. It appeared further that the matter had not been brought before any other grand jury, and, according to the established practice in such cases, could not be so brought without a new complaint.

At the close of the plaintiff's case, the defendant's counsel moved for a non-suit, on two grounds. 1. That the plaintiff had failed to show that the proceedings against him were taken without probable cause. 2. That the plaintiff had failed to show that there had been such an ending of those proceedings as the law contemplates. The decision of the court in overruling this motion is the first matter assigned for error.

All the authorities agree that in actions of this sort, the plaintiff, in order to recover, is bound to show (1) that the prosecution or proceeding of

which he complains is legally at an end; and (2) that it was instituted maliciously and without probable cause. 2 Greenl. Ev., §§ 452, 453, and cases cited; Roscoe's Dig. Law of Ev. 770, 771, and cases cited; Clark v. Cleveland, 6 Hill, 344, and cases; Burlingame v. Burlingame, 8 Cow. 141, note 1; Munns v. Dupont 1 Am. Lead. Cas. 249 (\*200), 280, (\*225). But while the general rule, as to the necessity of showing that a malicious prosecution is at an end, in order to maintain an action for it, has been long settled beyond dispute, its application has given rise to much discussion in the courts, as well as some difference of opinion.

Was the rule properly applied by the court below? It is insisted on the part of the plaintiff in error, that the prosecution could not be terminated in the sense of the rule without a formal order of discharge by the court; and that having failed to show this essential fact, the plaintiff below should have been non-suited at the trial, or the jury instructed to find for the defendant.

It must be admitted that this position is supported by respectable authorities. Mr. Greenleaf says: "If the party has been arrested and bound over on a criminal charge, but the grand jury did not find a bill against him, proof of this fact is not enough without also showing that he has been regularly discharged by order of the court; for the court may have power to detain him for good cause until a further charge is preferred for the same offence. But in other cases the return of *ignoramus* on a bill by the grand jury has been deemed sufficient." 2 Greenl. Ev., § 452. The doctrine first stated in this citation, and to which the learned author seems to give his sanction, is supported by a reference to Thomas v. De Graffenreid, 2 Nott & McC. 143. In that case, which was an action for a malicious prosecution, the opinion of the court, after expressing doubt as to the correctness of what was said by Buller, J., in Morgan v. Hughes, 2 T. R. 225, goes on to say: "The rejection of a bill by a grand jury has never been held in this State as the legal end of a prosecution, unless the party has been regularly discharged thereupon by order of the court. Another bill may be preferred." This opinion is in harmony with previous decisions in the same court.

It was held in Smith v. Shackelford, 1 Nott & McC. 36, that the entry of a *nolle prosequi* on the back of the warrant, by the proper prosecuting officer, was not such a termination of the prosecution as would, without an order of discharge from the court, enable the party to maintain an action for malicious prosecution; and in O'Driscoll v. McBurney, 2 Nott & McC. 54, that if the proceeding complained of "could be considered as a prosecution, it was necessary to show that it was at an end; and the refusal of the grand jury to act on it would not have been a final termination of it, for the defendant might have applied to another grand jury, who might have thought proper to present the plaintiff."

These decisions seem to me to involve a double fallacy in assuming (1) that what the rule requires to be at an end is not the particular proceeding

complained of, but the plaintiff's liability to be prosecuted for the same offence charged in that proceeding; and (2) that a discharge by order of the court would relieve him from such liability. The question being whether or not, by the entry of a *nolle prosequi*, the rejection of a complaint by the grand jury, or the return of an *ignoramus*, a particular prosecution, alleged by the plaintiff to be false and malicious, and injurious to his rights, is at an end in the sense of the rule, the answer of the court in effect is that the prosecution is not at an end in that sense, and cannot be without a discharge by order of the court, for the reason that, without such a discharge, the plaintiff might still be prosecuted. Another complaint might be made; another bill might be preferred for the same offence. But manifestly this may be done just as well after as before a formal discharge by the court. And it is equally clear that the fact that the plaintiff may still be prosecuted for the same offence can have no pertinence to the question as to the termination of the prosecution or proceeding complained of, except upon the wholly untenable theory that an action for a malicious prosecution cannot be maintained so long as the plaintiff remains liable to be prosecuted for the same matter with which he alleges himself to have been falsely and maliciously charged. This has, indeed, been frequently, if not generally, held with respect to the formal action for conspiracy, but, as is clearly pointed out by Parker, C. J., in *Jones v. Given*, Gilb. Cas. 185, for reasons peculiar to that action, and founded on the form of the writ. In that case, where one of the questions was whether an action on the case for malicious prosecution could be maintained without showing a verdict of acquittal, Parker, C. J., refers to *Smith v. Cranshaw*, Lutw. 79, as involving the same question, and states that it was there held, upon great consideration, that an acquittal was not necessary, but that an endeavor, falsely and maliciously, to indict a man, etc., though *ignoramus* be returned upon it, is sufficient, "and this," he adds, "was only a desertion of the prosecution, which was not tried, nor otherwise at an end nor determined." He cites also a number of old cases to the point that, if the bill be returned *ignoramus*, it is no objection to the action for malicious prosecution, by which I understand him to mean that, by this return, the alleged malicious prosecution is shown to be at an end in such a sense that an action may at once be maintained for it. It is clear that such was understood to be the law by one, at least, of the judges who decided *Morgan v. Hughes*, already referred to. The question being whether, in an action of this sort, the plaintiff's alleging, in his declaration, that he had been discharged from his imprisonment, amounted to a statement that the prosecution was at an end, Buller, J., said: "There are various ways by which a man may be discharged from his imprisonment without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution." It is true that this was said after stating

his agreement with Ashhurst, J., that the action ought to have been trespass and not case, and that if he had stopped there the result would have been the same. But that he should make such a remark at all, considering the circumstances under which it was made, and in the absence of any indication of dissent or doubt, goes far to show that the point under consideration was not then, and in that court, regarded as open to any doubt.

What is said by Blackstone (4 Com. 305) does not differ materially from the view expressed by Buller, J., in the case just referred to. Speaking of the effect of the grand jury's not finding a bill, he says, "Then the party is discharged without further answer. But a fresh bill may afterwards be presented to a subsequent grand jury." The meaning of which seems plainly to be that, while another prosecution may be instituted for the same offense, the particular prosecution or complaint, which has resulted in the failure to find a bill, is, *ipso facto*, completely at an end.

Without pursuing this question further, my conclusion, from what has been said, and from the authorities referred to, is that the rule contended for by the plaintiff in error rests upon no sufficient ground of reason or authority, and savors too much of "acute technicality" to commend itself to the sanction of this court.

The plaintiff below, having shown that the prosecution was terminated by the grand jury's throwing out the bill, had shown all that was required in order to maintain his action, and there was, therefore, no error in refusing to non-suit on the second ground.

The other ground upon which the non-suit was claimed was, that the plaintiff had failed to show that the proceedings against him were taken without probable cause. It was not questioned that the plaintiff was bound to show this by some affirmative evidence. There was no error, however, in refusing to non-suit for want of such evidence, because, in the first place, the plaintiff had shown a rejection of the complaint by the grand jury, which has generally been regarded as *prima facie* evidence of want of probable cause; and, in the second place, he had given evidence of facts from which it might be inferred that the defendant had no actual belief or suspicion that the plaintiff had committed the crime with which he was charged; and it was the province of the jury, and not of the court, to say whether or not the facts would warrant such an inference. 2 Greenl. Ev., § 454; 1 Am. Lead. Cas. 266, 268.

At the close of the case, the court was requested to charge the jury that if they believed that the defendant gave to the magistrate a fair statement of the facts, and, after such statement, made a complaint by advice of the magistrate, the verdict should be for the defendant.

The court declined to charge as requested, and this is assigned for error. The court was clearly justified in refusing this request for two reasons—First. The request assumes that there was evidence in the case tending to show that the defendant made a statement of facts to the magistrate, and then made his complaint by advice of the

magistrate. The case shows that, while such evidence was offered, it was objected to and overruled by the court, without any exception being taken to such ruling. If there was any error it was in excluding the evidence offered, and not in refusing the request; but, second, even if the evidence had been admitted, there would have still been no error in the refusal to charge, because the legal proposition involved in the request, viz., that a defendant in such an action may excuse himself by showing that he acted under the advice of the committing magistrate, is untenable.

In 1 Am. Lead. Cas. 267 (\*215), what I understand to be the true rule upon this point, is thus stated: "If a party lays all the facts of the case fairly before counsel of competency and integrity, before beginning proceedings, and acts *bona fide* upon the opinion given by the counsel, however erroneous that opinion may be, he is not liable to this action. \* \* \* A defendant can not excuse himself by showing that he consulted with an unprofessional person, and followed his advice." See Id. 267, 268. Two other requests to charge were properly refused by the court for reasons which have been already sufficiently stated.

The judgment of the circuit court must be affirmed.

#### RAILROAD MORTGAGES.

##### CALHOUN v. PADUCAH & MEMPHIS R. CO.

*United States Circuit Court, Western District of Tennessee, April 7, 1879.*

1. RAILROADS—MORTGAGES—ACCRETIONS.—After-acquired lands not used in connection with the actual operations of a railroad, can not pass under a general mortgage of the railroad itself, as a part thereof, under the doctrine of accretions.

2. AFTER-ACQUIRED LANDS.—Where the property conveyed by such a mortgage is described as "the railroad then constructed and to be constructed, etc., and all other corporate property, real and personal, of said railroad company, belonging or appertaining to the said railroad, whether then owned or thereafter to be acquired," lands subsequently acquired and not essential to the operation of the road do not pass by the mortgage by implication. If it be intended to include in the mortgage such lands expected to be acquired, they must be described with reasonable certainty.

The Paducah & Memphis Railroad Company executed a mortgage which has been foreclosed in this cause. It conveyed "all the railroad of said company, as well that part then constructed and completed as the part thereof which should thereafter be constructed and completed; and all and singular the right of way of said company, and the lands, real-estate, rails, tracks, bridges, buildings, depots, station-houses, shops, warehouses, structures, erections, fixtures and appurtenances thereunto belonging or in any wise appertaining, whether then owned and possessed, or thereafter to be acquired by it; and also all the locomotives, engines, ten-

ders, cars, carriages, shop-tools and machinery, and all the franchises, rights and privileges and all other corporate property, real and personal, of said railroad company, belonging or appertaining to the said railroad, whether theretofore acquired and then held or owned, or thereafter to be acquired by said railroad company, including all depots, warehouses and structures and all lands acquired or designed for depots, warehouses or structures, at either terminus or along the line of said railroad, whether then held and owned or thereafter to be acquired by the said railroad company; and all continuations, branches, tracks or extensions of said railroad to such depots, warehouses and structures; and also all the right, title and interest which the said Paducah & Memphis Railroad Company then had or might thereafter acquire under and by virtue of any lease to it in and to any other railroad branching from or connecting with the said railroad of the said railroad company hereinbefore described, or in and to any other property, real or personal, used or to be used by the said railroad company in connection with its said railroad, or with any railroad leased by it as aforesaid; and all and singular, the tolls, incomes, earnings and profits of the said railroad of said railroad company and of any railroad leased by it as aforesaid; and also all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railroad company, of, in and to the same, and every part and parcel thereof, with the appurtenances to have and to hold," etc.

Subsequently the company acquired by deed from one Kerr forty-four acres of land lying along and adjacent to the roadway. It appears by the deed that this tract, together with two or more acres, before granted as right of way, was conveyed to the company in consideration of its locating a station at that place known as Kerrville. It appears by the proof that the company surveyed the land into town lots and offered the same for sale as such.

The petitioners, Fisher and others, having procured judgments which were by law a lien on said estate, levied their executions on these town lots, and now claim on the ground that they are not included in the mortgage.

*Metcalf & Walker*, for petitioners; *Gannett & Patterson*, for defendants.

##### HAMMOND, J.:

It is insisted by the petitioners that the land in dispute is not within the description of the property conveyed, or if it can be so held then, that the mortgage is inoperative because this land is not more particularly described, and was not then owned or in expectancy. However carefully we analyze the words and sentences used in describing the property conveyed, much may be said on either side, and there is no very clear indication either way, as to the actual intention of the parties in relation to land situated as this is and acquired as this was. It is not unusual for railroad companies to own lands not at all connected with the narrow strip occupied by the road-way and its appurtenances, and not unusual to include such lands in the

mortgages. Neither can it be denied, that under a properly constructed instrument, lands of that character to be subsequently acquired may be included with the other property conveyed. But all mortgages of the kind, which have fallen under my observation, make some provision for utilizing the outside lands by their sale and the application of the proceeds to the purposes of the trust, generally to the construction or betterment of the road itself. The entire absence of any such provision in this mortgage, more than any other circumstance, inclines me to the belief that as a matter of fact, lands such as these were not in the contemplation of the parties. Besides, as to other property already included, there is no ambiguity whatever, and it is only when we are called upon to say whether *this land* was conveyed by the instrument, that it becomes perplexing in its uncertainty of description; yet, the expression, "all other, the corporate property, real and personal, of said railroad company, whether heretofore acquired and now held, or owned, or hereafter to be acquired by the said railroad company," and, perhaps, other phrases in the description, are broad enough in terms to cover this land. It is doubtful if the words, "belonging or appertaining to the said railroad," as used in connection with this phrase, were intended to limit the general description to lands to be used in the railway, and attendant on it for depots, warehouses, structures, etc., because these had been already abundantly described with the description of the railway itself. The word "railroad," as used here, may mean *railroad company*, as it frequently does. Ordinarily, this general description would be controlled by the subsequent enumeration contained in the words "all depots, warehouses and structures." Pullan v. C. & C. R. Co., 4 Biss. 35, 43; 3 Washb. Real Prop. 400, 431. But when this rule of construction is relied on, it will be generally found that the particulars are introduced with a *videlicet*, or some such manifestation of the intention to restrain the general description. Bouv. Dict. words "Videlicet," "Scilicet;" and this *ejusdem generis* rule of construction always yields to the intention to be gathered from the context and general scope of the whole instrument. Williams v. Williams, 10 Yerg. 76; Edmonds v. Edmonds, 1 Tenn. Ch. 163. Here the particulars are introduced by the word "including," which does not indicate a restrictive intention, but rather the contrary. These particulars having been already more particularly described, may have been inserted out of abundant caution, and not for the purpose of confining the mortgage to the railway and its superstructure. The same uncertainty prevails if we consider the other terms of this description supposed to include this land. But, notwithstanding this general description is broader than in Dinsmore v. R. & M. R. Co., 13 Wis. 649, or that in Seymour v. C. & N. F. R. Co., 25 Barb. 284, the case falls within the principle of these cases, and the case of Shamokin Valley R. Co. v. Livermore, 47 Penn. St. 465, all excluding lands situated like this, under mortgages very similar to the one under consideration. Walsh v. Barton, 24 Ohio St. 28; Parrish v. Wheeler, 22 N. Y. 494.

A mortgage by a railroad company does not, by implication, cover property not essential to its business. 1 Jones Mort., § 156. In this case, while all other property is described with marvelous detail, this, if intended to be conveyed, is only described by doubtful general terms. It does not seem, from other provisions, and from the whole instrument, to have been within the scope of the contract the parties were making. This point would be sufficient to decide the case, but inasmuch as it may be doubted, I have considered it on the assumption that the intention of the parties was to convey all lands not immediately connected with the railway, and appurtenant to it, then owned and subsequently to be acquired.

Railroad mortgages have, on grounds of public policy, by a sort of *eminent domain*, somewhat trespassed upon some of the best assured doctrines of the common law; but the courts have not unconditionally surrendered to them all the principles which govern in determining the rights of property as between ordinary individuals. On the doctrine of accretion, it has been held that, without particular mention of the property afterwards acquired, a mortgage by a railroad company will pass under a general description property subsequently acquired which is essential to its use, and may be fairly taken as a part and parcel of the thing which we call a railroad. 1 Jones' Mort. §§ 152, 161. But as to its other property, not regarded as accretions to the road itself, these mortgages are governed by the same rules as in other cases. The broad doctrine stated in Mitchell v. Winslow, 2 Story, 630, has come to be taken as quite an accurate statement of the principle that after-acquired property may be the subject of a sale or mortgage; but, in its application, the courts have established that the general principle not only has exceptions, but in all cases must conform to the rules governing all contracts. It is said that, in relation to the sale of things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell—of an executory contract. Things not yet existing which may be sold, are those which are said to have a potential existence—that is, things which are the natural product or expected increase of something already belonging to the owner. But he can only make a valid agreement to sell—not an actual sale—where the subject of the contract is something to be afterwards acquired. Wyatt v. Watkins, 1 Tenn. Leg. Rep. 148, 150; Benjamin on Sales, § 78; 2 Story's Eq. 1040, 1231; 1 Jones Mort., § 149; Everman v. Robb, 52 Miss. 654; Phelps v. Murray, 2 Tenn. Ch. 746; Looker v. Peckwell, 38 N. J. L. 253; Merrill v. Noyes, 56 Me. 458; Phila. W. & B. R. Co. v. Woelpper, 64. Pa. St. 366; Ellett v. Butt, 1 Woods, 214; Ball v. White, 94 U. S. 382.

In the application of this principle to railroad mortgages, it will be found that the courts sometimes refer them to one of these classes, and sometimes to the other, as the property is regarded as personal or real property. 1 Jones Mort., § 154, and cases cited; Pennock v. Coe, 23 How. 117;

*Whitewater Valley Co. v. Vallette*, 21 How. 414, 422; *Dunham v. R. Co.*, 1 Wall. 254, 267, 268; *Shaw v. Bill*, 95 U. S. 10; *Pullan v. C. & C. R. Co.*, 3 Biss. 35; s. c. 5 Biss. 237 and notes; *Phelps v. Murray*, 2 Tenn. Ch. 753. It is said in this last case that a contract relating to realty was always enforceable in equity, and therefore a conveyance of realty not the present property of the vendor is good in equity. And all these cases show that there never was any difficulty in treating a contract to convey real estate to be subsequently acquired, as a mortgage of it, in all cases where the object was to secure a debt. We have already seen that after-acquired lands not used in connection with the railroad can not pass under a general mortgage of the road itself, as a part of it, on the principle of accessions to it; and hence it follows that, as to this kind of property, the contract must be treated as an agreement to mortgage; and under the rule that a court of equity will treat that as done which is agreed to be done, it constitutes a lien upon the land specifically mentioned. It was held in *Wilson v. Boyce*, 92 U. S. 320 that a statute creating a lien upon "the road and property of the company" took effect to include lands disconnected with the road. It was said that a deed "of all my estate," or of "all my lands wherever situated," passed title. 1 Jones Mort., § 65; *Reid v. Wilmington R. Co.*, 13 Wall. 264, 269. As to property already acquired, this description could be made certain by extraneous evidence, but it would be impossible by such a description, in conveying subsequently acquired lands, to designate them; and as against creditors the description must be reasonably certain, or it does not operate as notice. 1 Jones Mort. §§ 66, 528, and cases cited; *Seymour v. C. & N. F. R. Co.*, *supra*; *Dinsmore v. R. & M. R. Co.*, *supra*; *Shamokin Valley R. Co. v. Livermore*, *supra*. The rule of *Wilson v. Boyce* cannot be applied to lands not already owned at the time the deed was made, without wholly breaking down the rules of law which require the mortgagee to give notice by the mortgage of the property claimed under it. No case that I have found gives any support to the doctrine that a grantor may convey by that description alone "all the lands he may subsequently acquire," and thereby pass every parcel of land which may afterwards become his own. Parties may, as a security for their debt, mortgage unsurveyed lands by an agreement to purchase them, when not yet acquired, as in *Wright v. Shumway*, 1 Biss. 23, and other cases. And no doubt a railroad company might, by contract, agree that the mortgage should cover all lands which should be subscribed to it for stock, or to be granted to it by the government in aid of its construction or the like description; but every such contract, if not designating by metes and bounds the lands to be acquired, should indicate with reasonable certainty the particular property, so that all persons would know what was intended to be conveyed. And I think, in such cases, the power to mortgage would be limited to such lands as the company at the date of the instrument had an expectation of obtaining, or to such lands as could be designated in the agreement itself, as those upon which it was to operate.

The result is that the prayer of the petitioners must be granted, and their judgment liens held paramount to the mortgage.

#### ARCHITECT — POSITION OF ARCHITECT WHEN CERTIFYING AS TO WORK DONE — ACTION BY BUILDER AGAINST ARCHITECT.

STEVENSON v. WATSON.

*English High Court of Justice, Common Pleas Division, March, 1879.*

A COMPANY EMPLOYED THE DEFENDANT as their architect to design and supervise the building of a hall. The plaintiff undertook to build the hall, and the contract to build was signed by the company and the plaintiff, the defendant being no party thereto. The contract stipulated that the defendant should be at liberty to make such additions to, and deductions from, the original plan as he might deem advisable; the remuneration for such alterations to be estimated by him in a certain manner; all matters in dispute were to be left to the defendant, whose decision was to be final. The statement of claim alleged that, during the progress of the work, the defendant gave certificates from time to time, and the plaintiff thereupon received payment of various sums; but that, in estimating the final balance due to the plaintiff, the defendant did not use due care and skill in ascertaining the amount to be paid to the plaintiff, and neglected and refused to ascertain the amount of the additions to, and deductions from, the original plans in the manner stipulated for, and "knowingly and negligently" certified for a much less sum than was really due; and it was further alleged that, when the error was pointed out by the plaintiff, the defendant refused to reconsider his certificate. Held, on demurrer, that the duties of the architect were not such as could be deputed to an ordinary clerk, but called for the exercise of professional judgment and skill; that no fraud was charged against him, and that accordingly the action would not lie.

PER LORD COLERIDGE, C. J.—The plaintiff had taken the defendant for better or for worse, not as an arbitrator, but as a person whose opinion, as a condition precedent, he had to obtain before he could get a sum of money; and this being so, the plaintiff could not bring an action against the defendant for refusing to give the grounds of his opinion or to reconsider it.

PER DENMAN, J.—The defendant, though not exactly an arbitrator, was in a position very analogous to that of an arbitrator.

In 1874 the Nottingham Temperance Hall Company employed the defendant as their architect to design and supervise the building of a hall. The plaintiff entered into a contract to do the work, which was signed by the company and the plaintiff, the defendant not being a party thereto. The contract contained, among others, the following conditions: "The architect may order any additions to, or deductions from the contract, without in any way vitiating the contract, and the amount of such additions to, or deductions from, the contract shall be ascertained by the architect in the same manner as the quantities have been measured,

and at the same rate as they have been priced at. The contractor and the directors will be bound to leave all questions or matters of dispute, which may arise during the progress of the works, or in the settlement of the account, to the architect, whose decision shall be final and binding upon all parties. The contractor will be paid on the certificate of the architect."

The statement of claim contained these paragraphs: "17. The defendant did not use due care and skill in ascertaining the amounts to be paid by the company to the plaintiff under the said contract, but, in ascertaining the net balance due to the plaintiff, neglected and refused to ascertain, and did not ascertain the amount of said additions to, and deductions from, the contract in the same manner as the quantities had been measured, and at the same rate as they had been priced out, or that there was more measure in the said description of works than was given in the bill of quantities, by making measurements in the same manner as the quantities had been taken, and neglected and refused to price out, and did not price out, the excess at the same rate, and make the stipulated addition to the contract in respect thereof according to the terms of the contract; nor did he use due care and skill to ascertain, in the manner provided by the contract, what was, in fact, the net balance payable to the plaintiff by the company, in respect of the works executed for which the plaintiff was entitled to his certificate; but the defendant knowingly or negligently certified as aforesaid for a much less sum than was in fact the net balance payable to the plaintiff in respect of the works executed." "18. Upon the receipt of the said certificate, the plaintiff requested the defendant to inform him of the data upon which the same was based, but he refused to furnish the plaintiff with them or to give him any information on the subject. The plaintiff thereupon requested the defendant to reconsider the said certificate, and offered to point out to him the said errors in the bill of quantities, and to give him any explanation he might require of the said accounts, but the defendant refused to reconsider the said certificate, and to allow the plaintiff to point out to him the said errors in the bill of quantities, or to explain the said accounts, or to hear any objection whatever on the part of plaintiff to the said certificate. By reason of the premises the plaintiff is unable to obtain payment from the company of the said balance, and has been deprived of, and has wholly lost the same, and the use thereof, from the time when he was entitled to the certificate of the defendant for the amount thereof."

The plaintiff claimed £1,364 12s. 3d. damages, and five per cent. interest thereon. The defendant demurred to the above statement of claim, on the ground that it showed that the defendant was in the position of an arbitrator, and that he had acted and declared his decision, and that it did not allege fraud or *mala fides*, and therefore, showed no cause of action, and on other grounds sufficient to sustain the demurrer.

*Wills, Q. C. (Graham with him)*, for the defendant, in support of the demurrer. The statement

of claim is bad. This is an attempt to make a *quasi*-arbitrator liable; and it has been decreed that an action like this will not lie against a person exercising such a function. *Pappa v. Rose*, 20 W. R. 62, 784, L. R. 7 C. P. 35, 525. In that case the defendant was a broker, and the raisins sold were to be of a fair average quality in the opinion of the selling broker, the defendant. A dispute arose as to the quality of the raisins, and it was settled by the broker in favor of one side. The other side then brought an action against the broker, and asserted that he had used no skill in deciding. But the Exchequer Chamber held that, as the broker had acted *bona fide*, the action would not lie; the broker being a kind of arbitrator. In *Tharsis Sulphur and Copper Company v. Loftus*, 21 W. R. 109, L. R. 8 C. P. 1, two parties agreed to be bound by the decision of an average adjuster as to a point referred to him; and the average adjuster was held to be an arbitrator, and, therefore, free from being liable to the action. The principle of the above two cases is identical with that of the present case. Here the contract provides that extra work should be measured in a particular manner, and it is alleged that the work was not properly measured, just as it was alleged in *Pappa v. Rose*, that the broker decided improperly as to the quality of the raisins. [LORD COLERIDGE, C. J.—In *Pappa v. Rose* the fruit was to be of fair average quality in the opinion of the broker. In this case all matters in dispute were to be left to the architect, whose decision was to be final. Decision must mean judicial decision, after the architect has taken pains to inform his mind. Would not the architect be in duty bound to consider?] Duty implies contract. There is no contract here, nor is there any contract in the two cases cited. [DENMAN, J. Suppose there was clear proof of dishonesty on the part of the architect, the defendant, to cheat the builder?] But no fraud is alleged. There is no authority for the builders' case. The most that equity has ever done is to make the arbitrator a party to a suit to set aside the award, and to order him to pay costs. A criminal information, or criminal proceedings, is the proper way of punishing dishonest judges. There is no legal duty on the part of an arbitrator even to be honest. An arbitrator can only be subject to an action where he has signed a contract to construe the instrument of submission, so as to make himself an insurer, and so to render him liable for erroneous construction. In *Ranger v. Great Western Railway Company*, 5 H. L. C. 72, the House of Lords held that the contractor who had bound himself to submit to the decision of the defendant company's engineer could not complain of the engineer's decision. The same principle was acted upon in *Scott v. Corporation of Liverpool*, 6 W. R. 136, 493, 3 De G. & J. 334. If the plaintiff succeeds, actions will be frequently brought against arbitrators by the losing side.

*Cave, Q. C. (Wood Hill with him)*, for the plaintiff. In the first place the architect was neither an arbitrator nor a *quasi*-arbitrator: but even if he were, the statement of claim sufficiently states that the defendant has been guilty of misconduct. A

bill of quantities was inserted and made part of the contract upon the assumption that the work set out was all that would be required to be done, except extras that might be decided upon. The defendant's work was of a kind that could be, and probably was, performed by a clerk; it was simply ministerial; and directly the contract was signed the plaintiff may be said to have been employed by the architect. It is true that an arbitrator is not called upon to use care or skill; but here the defendant surely undertook to measure up the work properly, and this was not arbitration. The plaintiff left the valuation in the defendant's hands because he was an architect; and had the plaintiff thought either that the defendant possessed no skill, or would not use it if he possessed it, he would not have left his interests in the defendant's hands. There is also a difference between an arbitration and award and a simple valuation. In the case of a valuation there is no dispute, and a mere appraisal made by a valuer acting between two persons need not be stamped as an award; *Leads v. Burrows*, 12 East 1. The defendant was not even a *quasi*-arbitrator, or, if he was, he was not so until the end of paragraph 17 in the statement of claim, *i. e.*, until he had measured up all the work. Up to this point there was no dispute between the parties, and the architect's judgment was not asked till then. As the defendant undertook the task of measuring up the work, he was bound to use skill and professional knowledge in doing the work: *Jenkins v. Betham*, 3 W. R. 283, 15 C. B. 168; *Story v. Richardson*, 6 Bing. N. C. 123. *Ludbrook v. Barrett*, 25 W. R. 649 decides that an architect is liable to an action if he conspire with the building owner to deprive the builder of his certificate; while, according to *Batterbury v. Vyse*, 11 W. R. 891, the builder may proceed against the building owner for acting in collusion with the architect to withhold the certificate from the builder. The judgment of Lord Chief Justice Erle in *Clarke v. Watson*, 13 W. R. 345, shows that an action can be maintained if the architect and the builder's employer act in collusion. In *Collins v. Collins*, 7 W. R. 115, 26 Beav. 306, an arbitration was said by the Master of the Rolls to be "a reference to the decision of one or more persons, with or without an umpire, of some matter or matters in difference between the parties." In the case of a valuation the "difference" is only a probable one; in an arbitration it is a present difference. No dispute had arisen here when the defendant gave his certificate, consequently there was no arbitration; and this would not be an arbitration within the 12th section of the Common Law Procedure Act, 1854. The defendant had simply to measure certain work, either himself or by his clerk, and he had no occasion to exercise his judgment. [DENMAN, J.—He surely had to exercise his judgment in saying what were extras.] That is not the point. We do not say that he had made a mistake in saying what are extras, we contend that he has valued the work wrongly. The defendant had to measure up the work and extras to see if they agreed with the

former bill of quantities. The allegation that the defendant made a wrong calculation "knowingly" is not bad, because it is averred that he did it negligently. Had the defendant refused to act at all, the action might not have been maintainable, but as he entered upon his duty he is bound to use care in accordance with *Coggs v. Bernard*, 1 Sm. Lead. Cas.

*Wills, Q. C.*, in reply.—It is not correct to say that the defendant had only clerk's work to perform. At the time the contract was made, the position of the parties was this: The company employed the defendant as architect, and entered into negotiations with the builder. In effect the company said to the builder, if you accept the work, the terms are, that we employ our own watcher to look after you in the shape of an architect; his decision is final, like that of the engineer in *Ranger v. Great Western Railway Company*. The architect is almost a servant of the company; and among the services he renders is that of saying what remuneration the builder is entitled to. The builder undertook the work on these terms, and made no contract at all with the defendant, who was really an arbitrator, for he is in the same position as the broker in *Pappa v. Rose*. No fraud is alleged against the defendant, and the misconduct imputed to him in not reconsidering his certificate is no misconduct at all, for he was not bound to reconsider, being, as we contend, an arbitrator.

#### LORD COLERIDGE, C. J.:

This is no doubt a case of considerable importance; and, but for the intimation that whatever judgment we pronounced would be reviewed, I should have taken time to consider what decision should be given. In some sense, this is an action of the first impression, and I was for some time of opinion that this action was maintainable. If it could have been fairly contended that, upon the statement of claim before me the relation of the parties was this, and this only,—that the plaintiff had undertaken to perform certain work under the contract with a third party; that, although the defendant was not in terms a party to that contract, yet that he was aware of the contract and had acted under that contract, which imposed upon him the duty of doing certain work requiring neither judgment nor opinion, but only the exercise of what I may call ordinary mechanical or arithmetical powers, and that his performance of that duty under the contract was necessary for the recovery of money by the plaintiff, and that he had refused to perform that duty—if that were the true view of the statement of claim, speaking for myself, I should have been of opinion that this action lay. I am not aware that this form of action, in the way in which I have stated, has ever yet been maintained; but it is certain, as far as I am capable of judging, that none of the cases which have been cited before us, and to the authority of which we should of course defer, are cases in which the supposed duty was of the kind described, or in which the breach of duty was of the kind which I have indicated. So far as I know, the action would not be concluded by authority, and for the maintenance of it there would have been, in my judgment, very

good grounds both of sense and of law. But my opinion is that that is not this action, and that when the statement of claim comes to be looked at, it will be seen that an attempt is made to bring an action for that which has been attempted again and again, and always, hitherto, without success; that is to say, to bring an action against a man for the unsuccessful or negligent performance of a duty, in the performance of which, or at the performance of which, the exercise of judgment and opinion is necessary. That being, in my opinion, the true view of the statement of claim, it appears to me that the cases which have been cited to us upon that point are binding cases, and cases which we should be bound to follow, whether we liked them or not. Speaking for myself, I entirely approve of those cases, and think them sound and right.

Now, this is an action by a contractor—not against the building owner, his employer, but against the architect of the building owner—and the action is brought under a contract, the whole of which is before us, but of which all that is material for the present purpose is contained in different paragraphs of the statement of claim. The contract is as follows—(I mean with regard to the matter now before us):—[His lordship here read the 17th and 18th paragraphs of the statement of claim, as given above.] That is really the whole of the contract, and neither counsel has pointed out anything else in the course of the case which bears on the question we have to decide. Now, the work was done, and during the progress of it the defendant, the architect, ordered additions to and deductions from, the contract for the work. The plaintiff states that “there were errors in the bill of quantities, and that there was, in fact, more measure in certain description of the works than was given in the bill of quantities.” That means, I assume, that more work had to be done by the plaintiff in order to carry out the contract, than the plaintiff thought he contracted for, or more than was specified in the bill of quantities. From time to time the defendant certified for certain sums of money, and those sums were paid during the progress of the works, and “the plaintiff, after the completion of the works, sent”—and these allegations seem to be very material—“sent,” not to the building owner, but “to the defendant, accounts in respect of the works executed, showing as the fact was that, after adding to the contract the amount of the additions ordered by the defendant, and deducting the amount of the deductions ordered by the defendant, and making the stipulated additions in respect of the said errors in the bill of quantities, and giving the company credit for the said sum of £10,100 paid by them as aforesaid (*i. e.*, by instalments, as certified by the defendant), there remained a balance of £1,616” odd, for which he was entitled to have the defendant’s certificate. And then the plaintiff says that the defendant, without calling upon him for any explanation, and without any communication with him, “sent to the plaintiff and to the company his certificate, certifying that the net balance due to the plaintiff over and above the amounts which he had previously certified was £251 14s. 4d.,” instead of the £1,616

odd alleged by the plaintiff to be due. That is what he said was done, and it is upon these facts that the plaintiff states his cause of action in the words of the 17th paragraph of the statement of claim.

Now, it is said, as I just now intimated, that that is a statement of a cause of action of this limited kind—that the only duty, as it is contended, cast upon the defendant was a purely ministerial and clerical duty; that he had to make certain arithmetical calculations; that, if these calculations had been properly made, £1,600 odd would have appeared to have been due; that he did not make, and would not make, those calculations, which were, in fact, purely arithmetical, and called for the exercise of no judgment, and demanded no expression of opinion at all; and that, for not doing that purely ministerial and clerical duty, inasmuch as it had damned the plaintiff to the extent of £1,400, this action would lie. I have said already that, if that were the true construction of this contract, and this paragraph of the statement of claim puts upon the contract what I thought was its true construction, at all events, as at present advised, I should be of opinion that the action lay; and I say so, assuming, as I do, that the true view of the words “knowingly or negligently” is the view which has been presented of them to us in the able argument of Mr. Wills, that “knowingly or negligently” does not mean fraudulently; it is a less offensive expression, and all that is meant by it is that the defendant, having to make an arithmetical calculation, the result of which can be known for certain, did not bring out the proper result, but some other result. Therefore, in a certain sense, he knew that the calculation he was bringing out as a purely arithmetical one must be wrong to the knowledge of the person making it, or wrong within his means, of knowledge. Well, I think if that were so, as I have said, my present impression is that the action would lie. But I do not think that that is the fair construction of that passage in the paragraph of the statement of claim. When the contract is looked at, and when the duty to be performed under the contract is looked at, it will, I think, be plainly seen that the duty to be performed by the defendant is not merely a ministerial, arithmetical or a clerical duty. It is manifest, upon looking at the contract itself, and upon looking at the bills of quantities which are to be the subject-matter of the contract, according to which the deductions or additions are to be calculated, that a great deal more than arithmetical calculation is necessary. The quality of the work, the extent to which this, that, or the other addition or deduction comes within this, that, or the other head of the bill of quantities, are questions peculiarly fitting for the determination of an architect; and in many cases—probably in all cases—the exercise of considerable professional skill and judgment is needed before certain arithmetical results can be arrived at. When we look at the documents, which I am ready for the present purpose to look upon as part of the statement of claim, it will, I think, be plainly seen that the result to be arrived at, a measure of value though it be, cannot be arrived

at by mathematical accuracy unaided by professional skill and judgment. Now, in a case such as I understand this to be, the true view of the contract is that, before the plaintiff can recover sums of money from the building owner, either during the work or at the completion of the work, there must be the certificate of the architect to ascertain what sums of money are due from the building owner to the plaintiff. Now, if I have rightly described the position of the defendant in relation to the plaintiff, it follows from decided cases that this action does not lie. It has been held, indeed, and it must be left to the Court of Appeals, if they think fit, to overrule, not only the decision of this court, but also the decision of the Court of Exchequer, that where the building owner, as in the Exchequer case, or the architect, as in the Common Pleas case, collude, actions, under such circumstances, will lie against the building owner and architect respectively. These two cases are precisely in point. They appear to me, I own, to be founded upon the clearest sense and the clearest justice; but, of course, if they are overruled, I shall submit. But here the two cases I have mentioned are not in point, because in this case, as I understand, neither fraud nor collusion is suggested. Collusion is not suggested at all, nor do I think is fraud, or even *mala fides*, unless it be by the word "knowingly," which, for the reasons I gave some time ago, and which I will not repeat, does not appear to me to carry Mr. Cave so far. I think, therefore, that this case is really within the authorities which have been cited to us, which decide that where the exercise of judgment or opinion on the part of a third person is necessary between two persons, a buyer and a seller, and in the opinion of the seller that judgment has been exercised wrongly and improperly, or ignorantly or negligently, an action will not lie against the person put in that position for such wrong, negligent or improper exercise of his judgment. I will not take up time by considering the general principles of policy to which we have been referred, and on which those judgments rest. It is enough for me, sitting here, that those judgments have been proceeded on, not only by a court of co-ordinate authority, but by the Court of Exchequer Chamber, and I can only say that I concur, not only in the judgment, to which of course I am bound to bend, but also in the reasoning and sense of those judgments.

It appears to me that the first portion of the statement of claim is disposed of, and that the demurrer must be allowed, so far as it applies to the statement of claim as contained in the 17th paragraph of it. There remains only the 18th paragraph to be considered. [His lordship here read the 18th paragraph.] Now it appears to me that what is stated in the 18th paragraph is no ground of action at all. Here, again, *mala fides* and collusion are not even suggested. It is simply that the architect, who is by the contract to form an opinion, and who has formed an opinion, and who has expressed that opinion, declines to say upon what grounds he founds his opinion, and declines to hear arguments to show that that opinion has been wrongly formed, I think if his position be

what I have already expressed, a person in that position is not bound to give grounds for his opinion, he is not bound to reconsider it. The person who has taken him—in this case the plaintiff has taken the defendant—for better or for worse, not as an arbitrator, because I do not think that the defendant is an arbitrator, but as a person whose opinion, as a condition precedent, he has to obtain before he can get a sum of money, can not bring an action against the person he has so taken for better or for worse for refusing to give the grounds of his opinion, or for refusing to reconsider that opinion, and for refusing to hear evidence to show that the opinion is wrongly formed. This, I think, is the better ground to put the case upon, because I first thought that the defendant might, in a certain view of the facts, be an arbitrator, that, as an arbitrator, he had not arbitrated, and at all events it might be that an action might be maintained against him according to an obvious analogy—not for arriving at this or that conclusion, but for not arriving at any conclusion, and for not doing his duty. But when I come to look at the words of the contract, the words upon which I was disposed to rest my opinion apply only to the case where there has been a dispute between the contractor and the directors—that is to say, between the plaintiff and the building owner; and at present I do not gather from anything in the case, or from anything that has fallen from either counsel, that any dispute has arisen; and, therefore, even supposing the defendant is made an arbitrator between the contractor and the directors, and that it is possible he could be forced to take upon himself the duty of deciding—and deciding means deciding judicially, and after reasonable inquiry—I do not think that question arises here, because, upon the facts before us, no sort of dispute to which those words apply has yet arisen, if it ever does arise.

I think, therefore, upon the whole, that the demurrer must be allowed:

DENMAN, J.:

I am of the same opinion. In this case the plaintiff is a builder who enters into a contract with a certain company to build a large building, and the defendant is the architect who is named in the contract between the parties as the person appointed by the parties, and agreed upon by the parties, to do certain acts, without the doing of which the plaintiff will not be entitled to the money for the contract that he is to carry out. There is here no direct contract between the plaintiff and the defendant. The defendant is not a party to the contract, and does not sign it, and he does not become a party to it so far as being mentioned in it except for the purpose for which he is mentioned; but it is contended that he nevertheless is bound by that contract so as to be liable in one of two ways—either as a person who has entered into an implied contract with both parties to do certain things which he has neglected to do, as it is alleged; or that, by virtue of his office, it was a duty to both parties, and to the plaintiff in regard to the subject-matter of this action, which he has neglected.

Now, I am not prepared to say that it is not

possible to conceive a case in which he may be liable under the contract itself, knowing that he is named in it, accepting certain duties under it, and to receive a certain benefit from it, which I conclude to be the case in every case where an architect is employed to perform duties such as these arising out of a contract between parties. It is perfectly possible that such a state of things might arise, and might easily be conceived, in which he might become, by acting under the contract, so far a party to the contract as, by virtue of that contract, either to be liable under it, or to be liable for the neglect of certain duties by reason of the office which he has assumed, which would give a right of action to either party.

But, supposing the duty does arise, it appears to me that then the question in this case is at once raised—What is the amount of that duty? Now, it appears to me that he certainly does not undertake, by undertaking the office of architect, any duty amounting to more than this: that he will honestly perform his duty. Supposing that this case alleged that the defendant, having undertaken to act between the parties under that contract, had fraudulently and corruptly, or in collusion or conspiracy with either of the parties, dishonestly taken a course which he ought not to have taken, and so done damage to either of the parties, I must say that as at present advised I entertain no doubt whatever that an action would have lain against him. There are plenty of *dicta* to that effect, all of which carry that before them, and I do not at present feel that one ought to have any hesitation about the proposition that in such a case an action would lie. But the case is, what is the duty that he here undertakes? and that depends upon what is the employment of an architect who acts under a contract of this kind.

Now, I do not intend or presume to hold any more than my lord has done, that he is to all intents and purposes an arbitrator, but I do think that his duties are very analogous indeed to those of an arbitrator, and that they are quite as much so in this case as was the case of the defendant either in the case of *Pappa v. Rose*, or in the case of *The Tharsis Sulphur Mining Company v. Loftus*, to which I will allude again presently. Now, the argument of Mr. Cave is that upon this particular contract he is not in the nature of an arbitrator at all. He is not a person who is appointed by the parties to decide questions which will require the exercise of discretion, of skill, and of judgment, in the high sense of the words at all, but that he is rather in the nature of a mere appraiser or valuer—a person who has to look at certain work, to measure it, and to cast up figures, and so to come to certain results, which is more in the nature of mere clerks' work than judicial work, or work which can be at all looked upon as resembling that of an arbitrator or of a person who has to work with judgment, requiring skill and discretion in the high sense of the words. It appears to me that so to hold would really be to ignore altogether and to leave out of sight the experience of almost every gentleman at the bar and every member of the bench who has ever had any-

thing to do with arbitration upon building contracts; and inasmuch as a very great number of us have had very considerable experience in that particular kind of business one ought, in deciding a case of this kind, to take into consideration the experience which we have of the subject, and one knows in point of fact, and in point of practice, that it happens over and over again that there will be very skilled architects called by the dozen, I may almost say, one on one side and one on the other, very often honestly differing to the amount of hundreds of pounds in the result, as to what is the proper mode of measuring up certain work, according to certain contracts, and consistent or inconsistent with bills of quantities and all such other documents as are alluded to in the present case. It appears to me that that is enough, without going into each detail of this case, to show that an architect is not a person who can be dealt with as a mere caster up of figures, who, if he makes a mistake in the result upon a matter of measurement, is to be looked upon as a person who has been guilty of negligence, by wrongfully casting up figures or anything of that sort. It is a matter of judgment; it is a matter of practice; it is a matter of very considerable nicety and discretion; and it appears to me that it would be quite ignoring the facts to hold him to be anything short of a person who exercises very important functions of a quasi-judicial character between the parties when a dispute arises upon matters of this kind. If that be so, it appears to me that the case of *Pappa v. Rose*, and the case of *The Tharsis Sulphur Mining Company v. Loftus*, apply to this case. The only distinction that has been spoken to by Mr. Cave is that in the latter of these cases, at all events, an actual dispute had arisen in the particular case between the parties, and that therefore he was an arbitrator, whereas he may not be in the nature of an arbitrator in a case where no dispute had, in fact, arisen. But it appears to me in such cases as this, that the architect is, from the beginning to the end of the contract, a person who is in the position of an arbitrator to this extent—he is always to have his eye on the progress of the works; he is to give certificates from time to time, all of which play a part in enabling him to decide, in the end, rightly or wrongly, with reference to his final certificate, and he can not at any time, I think, withdraw from the position which he holds from the first, unless he gives the matter up altogether, as a person who from the first exercises his judgment in the matter wherein the parties themselves can exercise no judgment at all. That being so, it appears to me that from the first the parties have trusted to him, and the only contract and the only duties which can be charged against him, are, that he is to exercise all his honesty in the matter, and that he is to deal fairly and impartially between the parties. If he violates that, and injures either of the parties, I should certainly, as at present advised, hold that he would be liable to an action; if he honestly does his duty, then it appears to me he has performed his part of the bargain, or his duty, if it be a duty arising from his accept-

ance of that duty, and the parties must abide by it.

Now, this 17th paragraph, however, of the statement of claim does contain a word which has been alleged to mean more than a mere assertion that he has neglected his duty by negligence in the matter of admeasurement, because it contains the words "knowingly or negligently." Now, I think it would be a very bad precedent indeed to hold that, by cramming into a statement of claim such a word as that, the parties would have a right to say, we mean something which the law generally designates by very different words, namely, such a thing as is done fraudulently, and maliciously, and corruptly, and without due impartiality between the parties. It appears to me that the word is perfectly consistent with a mere knowing the figures that he is putting down, and that it ought not at all to be stretched into meaning that which it would have been so easy to say if that were the allegation, that he had acted fraudulently, maliciously or corruptly.

There only remains to mention the 18th paragraph. There it is said that a different question arises, because after the certificate was made a question arose as to whether that certificate was correct, and then, at all events, he became a person whose duty it was to decide questions between the parties, and that he departed from impartiality in deciding that question without a hearing by deciding it in favor of the building owner without allowing the objection of the plaintiff to be heard, or without reconsidering his certificate; and I must say, in answer to that contention, it appears to me that he would have done wrong indeed, if he had, upon the mere request of the plaintiff, without any dispute having been raised between the parties which was referred to him by both of them, and which he would have had to decide according to the terms of the contract, if he had then and there, upon a mere complaint of the plaintiff, re-opened the matter and determined to reconsider his certificate. No question had arisen, no dispute had arisen, which fell within the words of the contract, that his decision should be final where matters of dispute arose in the settlement of the contract. The only dispute that arose was between him and the builder and all that appears is that the builder was dissatisfied with his certificate, and I apprehend that he had no right, because the builder was dissatisfied with his certificate, to re-open the matter at all, and therefore that complaint is even less well founded than the other.

Upon the whole I am of opinion there must be judgment for the defendant upon the demurrer. Judgment for the defendant.

#### NOTES OF RECENT DECISIONS.

**NEGLIGENCE — VIOLATING CITY ORDINANCE.** — *Philadelphia, etc. R. Co. v. Ervin*. Supreme Court of Pennsylvania, 36 Leg. Int. 244. Opinion by GORDON, J.—A railroad company owned a large wharf property in the city of Philadelphia, devoted to the shipment of coal, the wharves of which were not provided with cap

logs, as directed by an ordinance. *Held*, that the company was not bound to do more than make the place reasonably safe, and in determining whether the company complied with this obligation, evidence should have been admitted to prove the nature and character of the company's business; the company was not bound to put cap logs on the wharves if they were an obstruction to its business. 2. The plaintiff had a right to show by persons acquainted with the place that in their opinion it was dangerous. 3. The council of the city, by an ordinance, provided for putting cap logs upon wharves, and prescribed a penalty for its infraction: *Held*, that no civil liability at the suit of a person injured could arise from non-observance of this ordinance.

**PATENT LAW—DENTAL VULCANITE—CELLULOID.** — *Goodyear Dental Vulcanite Co. v. Brightwell*. Supreme Court of the District of Columbia, 7 Wash. L. R. 21. Opinion by HAGNER, J.—1. The decision of the Supreme Court in *Smith v. Goodyear Dental Vulcanite Co.*, 3 Otto, 486, holding that the letters patent issued to John A. Cummings, June 7, 1864, and reissued in March, 1865, for an improvement in artificial gums and palates, are valid, must be regarded by this court as a final determination, and making the said letters *res adjudicata*. 2. The use of celluloid in the fitting of artificial teeth is not an infringement on that patent.

**PARTNERSHIP — LIEN OF REPRESENTATIVES OF DECEASED PARTNER.** — *Hooley v. Gieve*. New York Common Pleas. 20 Alb. L. J. 12. Opinion by VAN BRUNT, J.—1. When a surviving partner continues the business of the firm and uses the assets of the old firm in such continuance, disposing of the stock and assets and investing the proceeds in new stock, so that the identity of the old stock is gone, and mingles such new stock with the property of his own, so that it can not be separated, the representatives of the deceased partner have a lien upon the whole of the new stock to the exclusion of the individual creditors of the surviving partner. 2. A and B were partners. A dying, left a will wherein B was appointed trustee of his estate, with directions to withdraw A's interest in the partnership and invest it and pay over the proceeds as directed. B, instead of withdrawing A's interest, continued the firm business for years with A's money, and became insolvent. *Held*, that the *cestui que trust* under A's will had a lien on all of B's assets to the exclusion of his creditors.

**CRIMINAL LAW—POWER OF JURY — CONSTRUCTION OF "DAY."** — *Kane v. Cone*. Supreme Court of Pennsylvania, 9 Pitts. L. J. 189. Opinion by SHARSWOOD, C. J.—1. In criminal cases, the jury are judges of the law as well as of the facts; this power is guaranteed by the bill of rights, and is not superseded by the provisions of art. 5, sec. 24, of the Constitution of 1873, in reference to appeals to the Supreme Court in criminal cases. 2. The word "day," as used in the eleventh section of the act of April 12, 1875, viz.: "That it shall not be lawful for any person with or without license, to sell to any person any intoxicating drink on any day on which elections are now, or hereafter may be required to be held," etc., includes the whole twenty-four hours of the day upon which an election is held.

**VENDEE'S LIABILITY FOR INJURY TO VENDOR BY VENDEE'S USE OF LAND SOLD—INJURY TO VEGETATION BY SMOKE AND HEAT FROM COKE OVENS.** — *Brown v. Torrence*. Supreme Court of Pennsylvania, 9 Pitts. L. J. 189. Opinion PER CURIAM.—1. Without contract or some relation of privity regarding the use to be made of land sold, the vendee stands to his vendor just as he does to others, and the maxim applies *sic utere tue ut alienum non laedas*. 2. A sold to B coal underlying certain lands, and B having begun

the manufacture of coke therefrom, A sold a portion of the surface to C. C sold a part of his surface to D, and a firm in which D and B were partners afterwards built coke ovens thereupon and began to make coke. In an action by C against B to recover damages for injuries caused by mining the coal and manufacturing coke: *Held* (affirming the judgment of the court below), that C, standing in no relation of contract or privity to justify these injuries, was entitled to recover. A person whose land has been injured by the negligent mining of coal beneath it, or whose crops have been injured by heat and smoke from the coke ovens, is entitled to recover such damages as the jury finds from the evidence he has sustained.

**NEGLIGENCE—DUTY OF MUNICIPALITY IN CASE OF HIGHWAYS GOVERNED BY SURROUNDINGS—FRIGHTENED HORSE—PROXIMATE CAUSE.**—*Borough of Pittston v. Hart*. Supreme Court of Pennsylvania, 9 Pitts. L. J. 182. Opinion by GORDON, J.—1. It is the duty of a municipality, through her proper officers, to keep the approaches to dangerous places in a public highway so guarded as to protect travelers. A highway must be kept in such order that even "skittish" animals may be employed without danger. 2. It is a question of fact for the jury whether dangerous places in a public highway are properly guarded, and in determining this the character of the highway and its surroundings must be taken into consideration. Greater care is demanded in towns than in sparsely settled districts. 3. It is no defense in an action for damages that the accident occurred through the fright of a horse in a dangerous place in a highway. It is the duty of those having charge of the public highways to construct them with reference to the natural timidity of the animal. 4. Whether the negligence of the officers of the municipality was the proximate cause of the accident complained of, is a question properly submitted to the jury.

**CONTRACT—WAGERS—PURCHASE AND SALE OF STOCKS ON MARGINS—DAMAGES.**—*North v. Phillips*. Supreme Court of Pennsylvania, 7 W. N. 151. Opinion by GORDON, J.—1. In cases of failure to deliver stock, where the parties stand in *equali jure*, and there is no fraud shown, the measure of damages is the same as for any other marketable commodity, i. e., the value of the stock on the day when it should have been delivered, with simple interest. The rule of damages, as stated in *Bank v. Reese*, 2 Casey, 143, applies only to cases of trusts, and cases where justice could not be reached by the ordinary measure of damages. *Huntingdon & Broad Top Mountain R. Co. v. English*, 5 W. N. 354, followed. 2. Transactions in stocks by way of margins, settlement of differences, and payment of the gain or loss, without any intention to deliver the stocks, are mere wagers. 3. In an action to recover damages for the sale of certain stock by the defendants, who were the plaintiff's brokers, the plaintiff testified on cross-examination: "I directed the defendants to purchase this stock as an investment; the purchase-money was \$18,000; I only gave \$500; I was not asked for more" (and so on of other transactions); "I bought to take money on the advance of the stock; I never paid the balance of the purchase-money, and never had the stock transferred to me. *Held* (reversing the judgment of the court below), that these were mere gambling devices, such as the courts will not help the parties to enforce. *Kirkpatrick v. Bonsall*, 22 Sm. 155 distinguished.

**PRINCIPAL AND SURETY—DELAY IN PRESENTING CHECK.**—*Fegley v. McDonald*. Supreme Court of Pennsylvania, 6 W. J. 133. Opinion by MERCUR, J.—1. Where the property of the principal debtor sufficient for the payment of the debt is so within the control of the creditor that, by the exercise of reasonable diligence he may realize the sum due him, and he

voluntarily and by supine negligence relinquishes it, the surety is discharged. 2. A and B were joint obligors in a bond conditioned for the faithful performance by A of his duties as treasurer of a masonic lodge. A was directed by the lodge to pay from moneys in his hands \$920 due the grand lodge for rent and dues. He gave the grand lodge his personal check, dated May 27, for this amount, having in bank on the day it should have been presented a sum sufficient to meet it; but the officers of the grand lodge did not present the check until June 4, and the bank having on that day appropriated the money for a debt due itself, there was no funds in the bank to A's credit. A never accounted to the lodge for the \$920, and the lodge paid subsequently, under threat of expulsion, from other funds, the sum due the grand lodge. *Held*, that B as surety was discharged from liability on his bond by the delay in the presentation of the check. A check is generally designed for immediate payment, and not for general circulation. It is the duty of the holder to present it for payment as soon as he reasonably may, and if he does not he keeps it at his own risk.

#### NOTES OF RECENT CASES IN THE UNITED STATES CIRCUIT AND DISTRICT COURTS.

**VENDOR AND VENDEE—STOPPAGE IN TRANSITU—LIABILITY OF MASTER TO SUB-VENDEE.**—A shipper of goods has no right to stop them, after a sale by his vendee to a third party; and the master's refusal to deliver to such subsequent vendee, though under the vendor's orders, is at the master's peril, and if loss occur (e. g. by reason of a falling market), he is responsible to such vendee.—*Schmidt v. The Pennsylvania*. United States District Court, Eastern District of Pennsylvania. Opinion by CADWALADER, J. 7 W. N. 98.

**ADMIRALTY—SALE OF CARGO BY MASTER.**—1. To justify the sale of a cargo by the master it must appear: (1), that the sale was necessary; (2), that it was made in good faith; (3), that the master was unable to communicate with his owners before the necessity for action became imperative. Whether a case could arise upon the lakes or rivers, where such a sale could be justified, *quære*. If so, it must be in some rare and exceptional instance, where an immediate sale is the only alternative of a total loss by jettison, and timely communication with the owner is impossible. 2. A schooner bound from Chicago to Buffalo, and laden with a cargo of wheat, was stranded upon an island near to the entrance to the Straits of Mackinaw. To get her off it was necessary to relieve her of a portion of her cargo. Without communicating with the owners, or making any efforts to tranship it and store it on the shore, the master sold portions of it to different parties, at one-fifth its value in Mackinaw, and one-tenth of what it was worth at the port of shipment. *Held*, that the sale could not be sustained, and that the buyers were only entitled to *quantum meruit* for their services and expenses in saving it. *Held*, further, that the master having embezzled the money received for the wheat, the purchasers were not entitled to be reimbursed the amount.—*The Bridgewater*. United States District Court, Eastern District of Michigan. Opinion by BROWN, J. 4 Cin. L. B. 448.

**ORAL CONTRACT—CONSTRUCTION OF—QUESTIONS OF LAW AND FACT.**—1. If there be any conflict as to the words used in an oral contract, or if the words themselves be ambiguous, the question of intent should be left to the jury. But if the words are clear and explicit, and the only difficulty is in the proper legal inference to be drawn from them, the rule is the same in oral as in written contracts, and it belongs to the court.

to give them their proper construction, even though the contract be incomplete in an essential particular. 2. Plaintiff and defendant, being adverse parties to a proceeding before the commissioner of patents in Washington, agreed that each should furnish to the other six printed copies of their testimony. Plaintiff had ordered 100 copies for its own use. Defendant thereupon asked plaintiff to order thirty extra copies for him. *Held*, that plaintiff could only recover under that state of facts the extra cost of the thirty copies, and was not entitled to the proportionate cost which these bore to the whole edition of 130 copies. *Held*, also, that these facts did not present a question for the jury and that it belonged to the court to determine the legal inference therefrom.—*Detroit Stove Works v. Perry*. United States Circuit Court, Eastern District of Michigan. Opinion by BROWN, J. 20 Alb. L. J. 10.

## ABSTRACTS OF RECENT DECISIONS.

### SUPREME COURT OF MICHIGAN.

*April Term, 1879.*

**SALES ON THE CORN EXCHANGE—GAMBLING CONTRACTS—PRODUCE BROKERS—AGENCY.**—1. The legality of a commercial transaction is a question of fact depending on the intent of the parties. 2. A contract good on its face is binding if either party meant it to be lawful or supposed that the other meant it to be so, and if it can be lawfully carried out without conflicting with any intent common to both when it was entered into. 3. If one of the parties to a bargain of sale contemplates an actual sale, the transaction may be perfectly valid irrespective of any illegal purpose entertained by the other. 4. A contract can not be a gambling contract, unless both parties concur in the illegal intent. 5. Where a commercial "operation" is a purely gambling transaction, and understood to be so by both parties, neither can sue the other on it. *Gregory v. Wendell*, 8 Cent. L. J. 115; *Lyon v. Culbertson*, 5 Id. 401. 6. Where an actual purchase is contemplated and the parties act in good faith, the fact that speculation is the object is of no legal importance. 7. It is lawful to buy merchandise for future delivery, even if at the time of purchase the seller has none to deliver. *Cossand v. Hinman*, 1 Bosw. 207; *Ashton v. Dakin*, 4 H. & N. 867; *Brus's Appeal*, 55 Penn. St. 296; *Pixley v. Boynton*, 79 Ill. 351. 8. Sales on the corn exchange, even for immediate delivery, do not necessarily contemplate the delivery of a specific lot, but only of the amount, kind and quality bargained for. *Nourse v. Prime*, 4 Johns. Ch. 490; 7 Johns. Ch. 90; *Horton v. Morgan*, 6 Duer, 56; 19 N. Y. 190. But one who sells for immediate delivery must be ready to deliver on call, and if he disqualifies himself from so doing by selling to another, the original purchaser can claim damages for conversion, or repudiate the sale and demand the corn. *Taussig v. Hart*, 58 N. Y. 425. 9. The court recognizes the commercial usage of buying and selling through brokers without looking beyond them to the original parties, whereby the brokers stand in the place of principals. But a purchaser may elect to have the contract turned over to him instead of relying upon his broker. 10. A broker who makes a purchase with the understanding, and with the concurrence of the seller, that the contract is to be at once turned over to his principal, ceases his connection with it on payment of his commission. 11. One can not be forced to accept another contracting party in place of the one with whom he contracted. 12. Brokers, who are paid a commission to buy

goods, are agents for those for whom they buy. 13. A produce dealer instructed a broker to bargain for corn deliverable some months later, and agreed to pay the broker a commission and receive and pay for the corn at the time of delivery. The broker had a like agreement to receive the corn from certain other brokers and they from the sellers. The first broker settled with his correspondents. *Held*, that on tendering to the produce dealer elevator receipts for the corn, he had discharged his obligations, and if the dealer refused to receive the corn or the receipts, he could sell it to indemnify himself and recover for any deficiency. 14. In delivering grain to a purchaser on 'change, it is sufficient to tender elevator receipts if it appears that the bearer could obtain the grain upon them. 15. A broker commissioned to buy corn did so, but finding the price rapidly going down, sold it for his own protection, and on the refusal of his principal to ratify the sale, replaced it and tendered the elevator receipts. The principal refused to receive them, and the broker sold the corn. Both sales were made at a loss, and the broker sued his principal for damages. *Held*, that in estimating damages, the first sale was immaterial. 16. A produce broker sued a dealer who had commissioned him to buy corn for future delivery, for refusing to receive the corn when tendered, and testified that while the expectation had been that the dealer would order a sale before the time for delivery, the broker had nevertheless expected to obtain title to the corn for delivery at the maturity of the contracts, if they were not sooner disposed of. *Held*, that in the absence of any evidence of previous gambling transactions between the parties, it was not proper on cross-examination to ask the broker if on any such dealings he had ever received any corn. 17. Where an understanding was entered into at Detroit for the purchase of corn at Chicago, which was shown to have been immediately carried out at Chicago, it was held not to be necessary to put in evidence the telegrams by which the orders to purchase were communicated. 18. A purchase by a broker through his correspondent is sufficiently shown in an action by the broker against his principal by showing that the broker had reported the purchase to his principal and received his approval. 19. One must be understood to warrant the genuineness of a transaction between himself and another, on which he leads a third person to rely. Opinion by COOLEY, J.—*Gregory v. Wendell*.

### SUPREME COURT OF MISSOURI.

*April Term, 1879.*

[Filed June 2, 1879]

**DAMAGES ON APPEAL ONLY AWARDED WHEN APPEAL IS WITHOUT MERIT.**—Ten per cent. damages should be awarded only in those cases where the record is examined and the appeal found to be without merit. The judgment of the St. Louis Court of Appeals in this case is therefore reversed and cause remanded to that court, with directions to enter a judgment of affirmance without damages. Opinion *PER CURIAM*.—*State v. Ryan*.

**MORTGAGE OF PERSONALTY NOT FRAUDULENT WHEN DULY ACKNOWLEDGED AND MORTGAGOR REMAINS IN POSSESSION WITHOUT POWER OF SALE.**—Action to set aside mortgage on furniture and fixtures, and also on a general stock of drugs and medicines, executed by defendant Byem to his co-defendant. Mortgage was duly executed, acknowledged and recorded, and was assailed by plaintiff as fraudulent and void as to creditors. On its face it showed that

mortgagor] was to remain in possession and control of the store as before its execution, till maturity of debt for which mortgage was given to secure. The mortgagor continued in business in said store selling the drugs and medicines mortgaged as usual. On trial, court refused an instruction asked by defendant to the effect that though the jury might find that after giving a mortgage the mortgagor remained in possession of the store, and continued his usual business of selling the drugs therein, yet this fact would not render mortgage void as to furniture and fixtures. *Held*, under the authority of the cases in this State, the instruction should have been given. *State v. Parker*, 31 Mo. 445; *Voorhis v. Langedorf*, 31 Mo. 451. Reversed and remanded. Opinion by NORTON, J.—*Donnell v. Byem*.

## SUPREME COURT OF IOWA.

June Term, 1879.

**JURISDICTION—BANKRUPTCY.**—The State courts have no power to set aside a sale made by an assignee in bankruptcy for fraud or other cause, either before or after the discharge of the assignee. The acts of the assignee were those of an officer of the bankrupt court, and the fraud, if any, was in a judicial proceeding and in a matter of which the Federal courts have exclusive jurisdiction. Opinion by BECK, C. J.—*Akins v. Stradley*.

**USURY—TAKING OF BONUS BY AGENT—HUSBAND AND WIFE.**—The taking of a bonus above the legal rate of interest by an agent for the loaning of money, without the knowledge or authority of the principal, will not render the note taken, and bearing only a legal rate of interest, usurious in the hands of the principal. *Condit v. Baldwin*, 21 N. Y. 219; *Rogers v. Buckingham*, 33 Conn. 81; *Tyler on Usury*, 156; *Gokey v. Knapp*, 44 Iowa, 32; *Wyllis v. Ault*, 46 Id. 46. The authority or knowledge of the principal will not be presumed from the fact that the agent was her husband in the face of the positive testimony of both parties to the contrary. Opinion by ROTHROCK, J.—*Bingham v. Myers*.

**PRACTICE—ACTIONS UNDER CIVIL DAMAGE LAW—TRIAL.**—Under the civil damage law of Iowa, which provides for making judgments obtained for damages caused by the sale of intoxicating liquors, liens upon the premises upon which the liquor was sold, the seller and the owner of the premises, when different persons, may be joined in an action which may be tried as against the seller as a law action, and after judgment the cause may be transferred to the equity docket for trial of the question of a lien against the property. Opinion by ADAMS, J. SEEVERS and DAY, J. J., dissenting.—*Loan v. Hinney*.

**CHATTEL MORTGAGE—LANDLORD'S LIEN—PRIORITY.**—As between the holder of a chattel mortgage, duly recorded, and a landlord upon whose premises the mortgaged property is used subsequent to the execution of the mortgage, and with the knowledge of the holder, the mortgagee is entitled to the prior lien. Opinion by ADAMS, J.—*Jarchow v. Pickens*.

**REAL ESTATE—POSSESSION UNDER UNRECORDED DEED—WHAT IS SUFFICIENT.**—The plaintiff claimed title to a certain tract of land under an unrecorded deed, and defendant through a subsequent recorded conveyance from the same party. The land was unimproved, and consisted partly of timber and the remainder the greater portion of prairie. It was shown that plaintiff had cut wood upon the land since his purchase, and had driven off trespassers and exercise

ed such other acts of possession as were consistent with the character and condition of the land. *Held*, that such possession was sufficient to constitute notice of his title, and that defendant's deed, although taken in good faith and for a valuable consideration, was void. Opinion by BECK, C. J.—*Nolan v. Grant*.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[Filed June 1879.]

**MONEY HAD AND RECEIVED—PAYMENT UNDER MISTAKE OF LAW.**—An action by the legatees of a will for money had and received will not lie against the administrator of an intestate estate to recover money erroneously paid to the intestate by the executor of said will, and which the intestate received under the belief that it was hers by virtue of said will. Otherwise, if any such money had been paid to said intestate to be paid by her to the plaintiff as being due from the executor, (*Mellan v. Whipple*, 1 Gray, 317;) or, if said intestate, in consideration of the payment to her, had promised the plaintiffs to pay the legacies for which the executor was liable to them, and they had thereupon released the executor and accepted her promise instead of his liability. Opinion by SOULE, J.—*Moore v. Moore*.

**CRIMINAL LAW—EMBEZZLEMENT—INDICTMENT.**—1. In order to a conviction for embezzlement, it is necessary to prove that the possession of the property as distinguished from its mere custody was in the defendant. If the actual or constructive possession was in the owner, than the wrongful conversion would be larceny and not embezzlement. The two offenses are distinct and must be charged in such terms as will indicate the precise offense intended to be charged. *Com. v. King*, 9 Cush. 284; *Com. v. O'Malley*, 97 Mass. 584; *Com. v. Barry*, 99 Mass. 428. 2. An indictment for embezzlement which alleges that a bank book was delivered to the defendant by the owner in trust and confidence, and with the direction that the defendant should thereby receive only the custody of it and should hold it until demanded by the owner and should then deliver it up and return it to him, sufficiently states that the actual and legal possession was parted with by the owner and vested in the defendant. Opinion by COLT, J.—*Com. v. Doherty*.

**MECHANIC'S LIEN.**—The petitioner for the enforcement of a mechanic's lien, did certain work in building a cellar wall in the fall of the year 1875, under a contract with C, by which contract he warranted that the wall should stand. The wall was completed in November, 1875. C caused the wall to be built pursuant to a contract with the defendant, which contemplated the erection of a building by C on the premises before January 1, 1876, and as a condition precedent to the conveyance of the premises to C. The time of performance was afterwards extended to April 1, 1876. During the winter the walls were damaged by frost, which damage was remedied in February and April, 1876; the last work done in restoring it to the condition called for in the contract was on April 17, 1876, and the petitioner filed his claim in the town-clerk's office May 15, 1876. The statute provides that the claim shall be filed within thirty days after the petitioner ceases to labor or furnish labor or materials for the structure. *Held*, that the implied consent of the defendant to the employment of the petitioner, growing out of the contract with C, had ceased to exist April 1, 1876, and that the work done by the petitioner in April was in the nature of repairs, for the

purpose of making good his warranty, and can not be regarded as consented to by the defendant by reason of the authority conferred by C under the contract; and the lien can not be maintained. Opinion by SOULE, J.—*Worthen v. Cleveland*.

**LIQUOR LICENSE — VOLUNTARY PAYMENT.** — By resolutions of the board of mayor and aldermen of the city of Lowell, passed March 28, 1876, and May 2, 1876, the fee for a liquor license of the first class was established at \$200; and on May 9, 1876, the said board voted to grant the plaintiffs a license of the first class. On May 10, 1876, the plaintiffs called upon the city treasurer and made a tender of \$200, and demanded of him a license. The treasurer informed him it would not be ready until the next day. On May 11, 1876, the plaintiffs again called on the treasurer, but were informed that since the aforesaid tender the said board had voted to change the fee to \$1,000. The plaintiffs thereupon paid the treasurer \$1,000 under protest in writing, and received their license. In an action to recover the excess (\$800), it was held, that the payment was voluntary and could not be recovered. *Cook v. Bosson*, 9 Allen, 393. The license when granted is not a contract between the licensee and the city or town by the officers of which it is granted. Municipal officers, in acting under the statute, are merely exercising the police authority which the statute gives as public officers. *Calder v. Kurby*, 5 Gray, 597. Opinion by SOULE, J.—*Emery v. Lovell*.

#### CORRESPONDENCE.

St. Louis, July 13, 1879.

HON. JOHN F. DILLON—My Dear Sir:

At a meeting of the bar of this city a committee was appointed, consisting of George A. Madill, Alexander Martin, Thomas C. Reynolds, James Taussig, G. A. Finkelnburg, Joseph Shippen and John R. Shepley, to prepare and submit an address to you upon the occasion of your retirement from the bench, to be subscribed by the members of the bar, placed before the circuit court for the district, and then transmitted to you. These were done, and now by their direction I inclose to you that address; and in so doing, permit me to say that there are few things in my professional life that have given me greater pleasure than to transmit to you this record of the high estimation in which you are held by your brethren of the bar in this district. You will find there the names of all those, except a few absent from the city, who have been connected with the court over which you have presided for so many years with such distinguished ability.

Yours truly,

JOHN R. SHEPLEY.

St. Louis, Mo.

Hon. John F. Dillon:

SIR: As members of the St. Louis bar we desire to express our regret that your official connection with the United States Circuit Court for the Eighth Circuit is about to terminate. But your voluntary retirement from the bench to another field of professional honor and usefulness, affords an opportunity, which we gladly embrace, of presenting to you this expression of our respect and confidence.

To you, as an author, the profession recognizes its indebtedness for a work which is a permanent contribution to legal literature, and is accepted as a standard authority wherever the English language is spoken.

To you, as a judge in high station for nearly twenty-one years, we bear testimony to a career distinguished

by uniform dignity and courtesy, by marked ability, great industry and perfect integrity. Questions of wide variety and of the gravest importance have engaged your attention, and found their solution in judicial opinions marked by clearness of statement, vigor of thought and profundity of learning. To the discharge of onerous duties you have brought a mind gifted with sound judgment, fortified by varied experience and enriched by wide research.

While your career has largely advanced and elevated the science of the law, it has also endeared you personally to the hearts of the people among whom your labors have been performed. Assured that you bear from the West to the East a public judgment of duty well and faithfully discharged, accept this our sincere testimonial to worth and ability.

Signed, John R. Shepley, Thos. C. Reynolds, Thos. T. Gantt, Geo. A. Madill, John B. Henderson, John D. S. Dryden, Chester H. Krum, Joseph Shippen, Thos. C. Fletcher, and by one hundred and forty other members of the bar of St. Louis.

DAVENPORT, IA., July 14, 1879.

Hon. John R. Shepley:

MY DEAR SIR: I have the honor to acknowledge the receipt of your letter of the 12th inst., transmitting, by the direction of the committee, the address of the members of the bar of the city of St. Louis upon my retirement from the bench of the circuit court. This impressive testimonial of the respect and estimation in which I am held by the bar of the great city of St. Louis, where for the past ten years so considerable a part of my official duties have been performed, has given me the sincerest pleasure. I have read it with pride, and shall preserve it with the autograph signatures as a cherished memorial of my life on the circuit. I gladly avail myself of this occasion to express to the learned bar of St. Louis my grateful acknowledgments for their uniform kindness, respect and consideration, and especially for the address with which they have honored me. I beg to assure them that I carry from the West to the East nothing which I more truly prize than their approving public judgment and friendly regard. Asking you personally to accept my thanks for the kind sentiments with which you accompanied the address. I remain, as ever,

Very truly and sincerely yours,

JOHN F. DILLON.

#### BOOK NOTICES.

**ESTEE'S PLEADING, PRACTICE AND FORMS** in Actions, both Legal and Equitable, under Codes of Procedure. Forms in actions; in special proceedings; in provisional remedies; and of affidavits and notices, etc. By MORRIS M. ESTEE, Counselor at Law. Second Edition. By JOHN HAYNES, Counselor at Law. In three volumes. San Francisco: A. L. Barncroft & Co. 1879.

With the third volume just issued the second edition of this valuable work is completed. The first edition was published ten years ago, and has been recognized as a work of great value to the profession. It is not local to the State in which it is published, but will be found useful in every code State. It is in three volumes; the first containing six hundred and thirty, the second six hundred and ninety, and the third five hundred and ninety-five pages. The index is very full and complete, covering alone one hundred and thirty pages. It can, without undue praise, be recommended to the profession as a practical and necessary work.

THE AMERICAN REPORTS, Containing all Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References. By ISAAC GRANT THOMPSON. Vol. 26. Albany: John D. Parsons, Jr. 1879.

The volumes of the State reports are now issued at a rate which defies the ability of the busy lawyer to keep an account of them, much less to read them. Outside of the public law libraries, there are but very few collections of legal works which embrace full sets of the American State reports. Half a century ago a lawyer in good practice might easily furnish himself with a complete law library; a decade ago, even, an entire report of the adjudications of the courts of England and America was not beyond the ambition of any member of the bar. But as the natural result of a system which in many States requires the filing of a written opinion in every case decided, the printed reports have at last outgrown the possibility of ownership in the case of ninety out of one hundred of the members of the legal profession. If every decision which is printed in the different State reports was of special interest to the whole profession; if thirty per cent. were not local in their application; if another thirty per cent. were not mere reiterations of former adjudications and well settled principles; if at least fifteen per cent. were not predicated upon particular states of facts never likely to arise again in their peculiar phases—then the position of the lawyer unable to obtain this necessary knowledge would be akin to that of a mechanic unable to possess the most improved tools in his trade. Happily, however, for the profession, in the modern State reports the chaff far exceeds the grain.

Out of eighteen volumes of reports from twelve States—Kentucky, Connecticut, Florida, Virginia, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, New York and Texas—the learned editor of this series rejects so large a proportion of the cases that what are left can be reprinted in full and annotated in a volume of less than 800 pages. Nor has his object been to embrace within the covers of this book as many volumes of the reports as it was possible. It has always been a marked feature of this series, that compression has in no instance been obtained at the expense of thoroughness. In examining the different legal publications which from time to time come under our notice, it but very seldom happens that we are able to resort as a means of comparison to this JOURNAL itself. That which gives a permanent value to the CENTRAL LAW JOURNAL, beyond its legal essays and miscellany, its criticisms, its digests of recent decisions, is the large number of "leading cases" which are reported in full in these columns. The eight volumes of the CENTRAL LAW JOURNAL now issued comprise a collection of English and American case law such as, it is safe to say, no other legal publication in this country can furnish, even at five times their cost. A proportion of these cases, much larger than any of our readers would imagine, is to be found in no other series. It is only a few weeks since the compiler of a forthcoming Digest of American Decisions wrote to us for permission to include in his work the cases from but two courts, and not reported except in these columns. An examination of the eight volumes of this JOURNAL showed that there were no less than one hundred and thirty-six adjudications on important and novel questions, entirely beyond the reach of the lawyer whose library does not contain these eight volumes of the CENTRAL LAW JOURNAL. And these cases, as has been said, were but a fraction of the whole.

Thus it is plain, that so far as case law is concerned, the best that a lawyer can do is to procure a series such as the CENTRAL LAW JOURNAL or American Reports, in which he can find all the leading decisions, with

abundant references to the rest. Mr. Proffatt's American Decisions, which commence with the earliest American reports, are to end where Mr. Thompson's volumes commenced. Together they will form the most complete collection of American case law which can be obtained at this time, or is likely to appear during the present century.

A MANUAL OF INTERNATIONAL LAW, by Edward M. Gallaudet, Ph. D., LL. D., President and Professor of Moral and Physical Science in the College for Deaf Mutes, Washington, D. C., has just been published by A. S. Barnes & Co., New York. The book presents, in a small volume of three hundred and twenty pages, the principles of International Law. As a text book for students it is excellent. It may be read with profit by every lawyer.—The Second Volume of VON HOLST'S CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES comes to us from the well known western publishing house of Callaghan & Co., Chicago. This volume treats of the important period of our history when General Jackson was President, and Texas was annexed. A full notice appeared in these columns on the issue of the first volume. See 3 Cent. L. J. 487.—A COMPLETE SECTION INDEX to the Colorado Civil Code, together with parallel section references to the Codes of California and New York, as found in Parker's California Practice Act, Harston's Practice, and the New York Code, as annotated by Voorhies and Wait, has been prepared by J. F. Frueauff, LL. D., of Denver.

#### QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

\* \* The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.

#### QUERIES.

8. NUISANCE—LICENSE.—A patent medicine man comes to town; gets a license from the city to sell his goods on the street; blocks up the sidewalk and the streets, and prohibits an easy passage for both pedestrians and wagons. Query. Would not an injunction lie to enjoin him from selling under the circumstances? Madison, Ind. J. H. S., JR.

9. EXEMPTION—CONSTRUCTION OF STATUTE.—Under sec. 3072, code of Iowa, occurs this clause: "One horse, unless a horse is exempt as hereinafter provided." Further on in the section it states that in order to hold a horse or team exempt the party must show that it is used habitually to earn a livelihood. Now, under this section, can a head of a family hold one horse in any event, or without having to show that he earns his living by it? Ex.

#### ANSWERS.

No. 34.

[8 Cent. L. J. 508.]

The debt which C owes A is not exempt to A, it not

being for wages. *S. J. W.* is mistaken in stating that "the garnishee act allows a man living with his family \$25 as exempt," *vide* § 14 Garnishee act. J. L. O. Joliet, Ill

## No. 3.

[9 Cent. L. J. 39.]

Misconduct of jurors, the parties to the suit not being in fault, is no ground for a new trial, unless the complaining party has probably been prejudiced by the irregularity. The experiments of the jurors were harmless, though perhaps improper; but it is not a case where prejudice is likely to be presumed. The case of *Clark v. Lebanon*, 63 Me. 393, 2 Cent. L. J. 594, is identical in principle with the one stated. The jurors were permitted on the trial to examine the note, and it can not be said that an examination at another time, under the circumstances stated, prejudiced either party. P.

## No. 4.

[9 Cent. L. J. 39.],

An action could not be maintained by the vendee to obtain a delivery of the goods sold, or to recover damages for their non-delivery, or breach of warranty or fraud in the sale. Nor would the law aid the vendor to recover possession from the vendee after he has parted with it. The sale for the purpose disclosed to the seller being contrary to public policy, the contract of sale was void, and the law leaves both parties where it finds them. Hence, no action will lie for the price of the goods. *Smith v. Bean*, 15 N. H. 577; *Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Langton v. Hughes*, 1 M. & S. 593; *Pearce v. Brooks*, L. R., 1 Ex. 212; *Taylor v. Chester*, L. R., 4 Q. B. 309. In *Pearce v. Brooks*, *supra*, the defendant, a prostitute, was sued by the plaintiffs, coach builders, for the hire of a brougham. It being shown that the plaintiffs knew her character, and also that the carriage was to be used as part of her display to attract men, it was held that they could not recover. In *Taylor v. Chester*, *supra*, the decision in *Pearce v. Brooks* was cited and followed by the court, the principle asserted therein being applied to the case of a pledge to secure payment for wine and suppers supplied to a brothel. While the earlier cases proceeded upon the theory that to prevent a recovery in such a case as is stated in the question, it must be shown that the seller expected to participate in the profits derivable from the immoral use of the article sold, the later authorities will, I think, be found to support the conclusion arrived at in this answer.

Chicago, Ill.

W. I. C.

## NOTES.

DAVID C. HUMPHREYS, late one of the Justices of the Supreme Court of the District of Columbia, died at his residence in Fairfax County, Va., on the 12th inst. Judge Humphreys was a native of Morgan county, Ala., and resided there until his appointment, in 1870, to the Supreme Court of the District of Columbia. He served in both branches of the legislature of Alabama several terms, and in 1868 was a candidate against Senator Spencer for the long-term Senatorship from that State, and polled a large vote. He declined to be a candidate for the short term. He was tendered a nomination for the House of Representatives, but declined. Judge Humphreys had been in ill health for some months past, and last spring his life was supposed to be in danger. Subsequently he recovered

sufficiently to be taken to his Virginia residence, and it was supposed that he was improving.—A spectator at the hearing of the appeal in the Bennett-Smith murder case, in New Jersey, gives the following description of the Court of Errors and Appeals of that State: "It is an imposing body, being composed of sixteen members all fine looking men. It is also peculiarly constituted. New Jersey, many years ago, conceived the idea that equitable judgment would be rendered by the court of last resort, if men not educated as lawyers were intermixed with the lawyers who were invariably made judges. Accordingly it was provided that there should be six "lay" judges, who should not be lawyers. The "lay judges" at present are: Caleb S. Green, of Trenton; Amzi Dodd, of Newark; Francis G. Lathrop, Receiver of the Central Railroad of New Jersey; Dr. Samuel Lilly, of Lambertville; John Clements, of Camden, and Samuel L. B. Wales, of Cape May county. The lawyer element is represented by Chancellor Runyon, Chief Justice Beasley, and Justices Dalrymple, Depue, Dixon, Knapp, Reed, Scudder, Vansyckel and Woodhull."

THE American Bar Association will hold its second annual meeting at Saratoga Springs, New York, on Wednesday and Thursday, August 20 and 21, 1879. The annual address will be delivered by the president of the association, James O. Broadhead, Esq., of this city, at the opening session. Besides the business to be transacted, papers will be read by Calvin G. Child, Esq., of Stamford, Connecticut, on "Shifting Uses from the Stand-point of the Nineteenth Century;" Henry Hitchcock, Esq., of St. Louis, Mo., on "The Inviolability of Telegrams," and George A. Mercer, Esq., of Savannah, Ga., on "The Relationship of Law and National Spirit." The session of the second day will be opened by an address by Edward J. Phelps, Esq., of Burlington, Vt. The annual dinner will be given on Thursday evening.—The London Conference for the Reform and Codification of the Law of Nations, will begin on the 11th of August, and the sessions will be held in the Guild Hall. Representatives will be in attendance from all the principal countries in the world. The delegates thus far appointed from the United States are: The Hon. John Welsh, United States Minister to England, the Rev. J. P. Thompson, F. A. P. Barnard, President of Columbia College, Judge Chas. A. Peabody, the Rev. Dr. S. I. Prime, A. P. Sprague, Professor T. W. Dwight, Judge James Emmott, Chancellor E. C. Benedict, Judge J. F. Dillon, Judge A. J. Parker, H. P. Wilds, Professor J. T. Platt, J. A. Felton, Rev. Dr. E. A. Washburn, Professor Archibald Alexander, F. A. Baker, Ashbel Green, Rev. Dr. Stoddard, Rev. Dr. Chambers, Abraham Lansing, Gen. Clinton, G. P. B. Fish, and David Dudley Field, most of whom have already signified their intention of being present at the conference. The subjects selected by the European Executive Committee, for discussion at the conference, are: First, International protectorate of telegraphic communications, consular jurisdiction in Oriental countries, collisions at sea, international maintenance of light-houses, mixed tribunals of Egypt, international rules of quarantine. Second, Bills of exchange, negotiable securities, foreign judgments, international concert in taking evidence, uniform standards of weights and measures, patents for inventions, bankruptcy. Third, General average, bills of lading, sea protests and ships' loss, law of affreightment. To this list the American Executive Committee has added the protection and neutrality of the projected canal across the Isthmus of Darien, extradition of criminals, sea signals, and uniform coinage. The general subject of international codification and arbitration will be considered.